that if that date had been stated the charge would have been a sufficient note or memorandum. What I am saying is that it has not been stated and therefore the charge is not a sufficient note or memorandum and that therefore there is no note or memorandum sufficient to comply with the requirements of the Ordinance.

This leads to the conclusion that the charge is unenforceable. On the face of it that conclusion may appear to be somewhat technical. On the other hand, not only do I agree, with respect, with the view of Swift, J., that in this connection the date is of special importance (see *Bennett v. Smith* [2]) but there has been a clear failure to comply with an express provision of the Ordinance. As was said by Lord Radcliffe in the case of *Kasumu v. Baba-Egbe* [3] in relation to the similar provisions of the English Money-lenders Act of 1927 which is clearly *in pari materia* with our own Ordinance:—

"When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made."

I would therefore allow this appeal with costs and set aside the judgment in the Court below. I am also bound by the decision of this Court in *AR. VR. Palanisamy Servai v. S. V. Lingham* [4] to say that the appellants should have the relief they asked for by way of return of the documents of title and entry of a memorandum of discharge on the land register.

Rigby J.: I have had the advantage of reading the judgment of the President of the Court, with which I agree, and to which I have nothing to add. For the reasons given by him I would allow this appeal with costs, order the return to the appellants of the documents of title and direct that a memorandum of discharge be entered on the Land Register.

Hepworth J.: I agree with my Lord and have nothing to add.

Appeal allowed.

Solicitors: *Hogan, Adams & Allan; R. G. Suppiah.*

THE CHINESE TIN MINES REHABILITATION LOANS BOARD v. CHEE HOI VOON

[O.C.J. (Good J.) February 2, 1959]

[Ipoh — Civil Suit No. 141 of 1954]

Practice and Procedure — Setting aside judgment — Principles on which the Court should act — R.S.C. 1957 O.13 r.10.

There is absolute discretion of the Court to set aside a judgment in default of defence, but the Court's discretion must be exercised in accordance with the settled principle that if the judgment is a regular judgment then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a substantial ground of defence. Lapse of time is no bar to the application.

Cases referred to:—

(1) *Labouchere v. Tupper* 14 E.R. 670.
(2) *Farhall v. Farhall* 7 Ch. App. 123.
(3) *Ang Chee Seng v. Tan Kee Swee* (1935) M.L.J. 245.
(4) *Evans v. Bartlam* (1937) 2 All E.R. 646.
(5) *Atwood v. Chichester* (1878) 3 Q.B.D. 722.
(6) *Hopton v. Robertson* (1884) W.N. 77.
(7) *Farden v. Richter* (1889) 23 Q.B.D. 124.
(8) *Chinese Tin Mines Rehabilitation Loans Board v. Chee Hoi Voon* (1958) M.L.J. 269.
(9) *S. Supramaniam Pillay v. Tan Kah Kiat* (1934) M.L.J. 133.

MOTION.

S. B. Coates for the plaintiffs.

F. C. Arulanandom for the defendant.

Cur. Adv. Vult.

Good J.: This is a motion to set aside the judgment of Buhagiar, J. given on 3rd July, 1954, in this suit; the judgment was for the sum of $28,594.71 with interest and costs, and was a judgment in default of defence.

The defendant, who is the applicant in the present proceedings, was sued as Administrator of the estate of his deceased father, but the judgment was expressed to be given against "the defendant" *simpliciter* and not in his representative capacity. The applicant's ground for making the present application is that the judgment was irregular as it ought to have been a judgment *de bonis testatoris* and not a judgment *de bonis propriis*.

There is abundant authority for the contrary proposition — *Labouchere v. Tupper,* [1] *Farhall*

v. Farhall [2] and *Ang Chee Seng v. Tan Kee Swee.* [3]

Mr. Arulanandom, for the applicant, relied on *Evans v. Bartlam* [4] as authority in support of the absolute discretion of the Court to make the order prayed for, and he relied on *Atwood v. Chichester* [5] as authority for the proposition that lapse of time is no bar to this application. I agree with him so far as the effect of *Atwood v. Chichester, supra* is concerned, but it appears to me that the Court's discretion must be exercised in accordance with the settled principle that if the judgment is a regular judgment then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a substantial ground of defence — *Hopton v. Robertson* [6] and *Farden v. Richter.* [7]

On the authority of *Farhall v. Farhall, supra, Labouchere v. Tupper, supra* and *Ang Chee Seng v. Tan Kee Swee, supra,* it is clear that the judgment was a regular judgment and there can be no merits in the application to set it aside.

In Civil Suit No. 239 of 1957, [8] the plaintiffs sued the defendant for the amount still owing to them after the sale of certain assets secured by a Bill of Sale; Barakbah, J. held that the matter was *res judicata* in the present suit by reason of Buhagiar, J's. judgment, and that that judgment was against the defendant personally. I respectfully agree and would refer to the case cited by Barakbah, J. in his judgment, *S. Supramaniam Pillay v. Tan Kah Kiat,* [9] from which it appears that there are no ground whatever for holding that Buhagiar, J's. judgment was irregular and no merits in the application to set it aside. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Braddell & Ramani.*

GOOI SEANG TUCK v. TAN PENG LOON & ANOR.

[O.C.J. (Rigby J.) February 3, 1959]

[Penang — Civil Suit No. 230 of 1958]

Practice and Procedure — Leave to defend — Appeal from Registrar's decision — Settlement of debt in smaller amount — Consideration — Accord and satisfaction — Cheque by 3rd party for a smaller sum — R.S.C. 1957, O.14 and O.54 r.21.

This was an appeal from a decision of the learned Registrar refusing leave to the appellant to defend proceedings brought against him under O.14 and giving the respondent leave to sign final judgment against him on the claim. At the commencement of the appeal counsel for the respondent raised, but did not seriously press, the preliminary point that the appellant was out of time with his appeal.

The normal practice in the Penang Supreme Court Registry is for the Registrar himself to fix a date for the return for hearing of the summons. In this instance the Registrar's decision was given on October 14, 1958 and the notice of appeal lodged on October 17. It was therefore lodged well within time. The learned Judge was informed by the Registrar during the hearing of this appeal, and in the presence of counsel for both sides, that at the time he received the notice of appeal he had already closed the list for the next ensuing date for work in Chambers, namely Monday, October 20. He therefore fixed the date for hearing in the list on the next date for the hearing of Chamber matters, namely, Friday, October 24 — the date on which the appeal was in fact heard. The learned Judge being satisfied, enlarged the time for hearing up to and including Friday, October 24, 1958.

The plaintiff claimed by way of a Specially Endorsed Writ for the sum of $12,000, being the balance due and owing to the plaintiff in respect of the sum of $50,000 paid by the plaintiff to the Bank of China as guarantor for the defendants under a contract of guarantee dated December 9, 1955. He applied under O.14 r.2 for leave to enter final judgment on the ground that there was no defence to the action. The 1st defendant, on behalf of both defendants, filed an affidavit showing cause. By his affidavit he admitted that the payment of the sum of $50,000 by the plaintiff to the Bank as guarantor for the defendants' firm had been made, but he averred that the claim had been settled "through arbitrators." The cheque in settlement was paid to the plaintiff by a third party.

Held: O.54 r.21 of the R.S.C. provides that in the case of an appeal from a Registrar to a Judge in Chambers not only must the appeal summons be taken out within five days from the Registrar's decision, but it must also be made returnable for hearing before the Judge within the five days. The advocate and solicitor should note that the primary responsibility rests with him to ensure that the notice of appeal in such matters should not only be taken out but also be made returnable within the period of five days. The most suitable course for counsel to ensure that the notice of appeal is returnable within the period of five days would be to request the Registrar to include it in the list (if need be, only for mention) for one or other of the days for the hearing of Chamber matters, namely, Mondays or Fridays;

(2) payment by a debtor of a smaller sum in satisfaction of a larger amount is not a good discharge of a debt, but where there is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration, such as a negotiable instrument given by a third party, as in the instant case, payment of a lesser sum in satisfaction of a debt may afford a complete accord and satisfaction.

Appeal allowed. Defendant given unconditional leave to defend this action.